IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

APPEAL FROM ORDER NO.898 OF 2005
FROM
ORDER DATED 5TH MAY 2005
ON
NOTICE OF MOTION NO.1302 OF 2005
IN
S.C. SUIT NO.6322 OF 2001

Shri Hansraj Sukhari Shah — Appellant
vs.
1. Shri Devraj Sukhari Shah & ors. — Respondents

Mr.Vijay Sutrale for the appellant.

Mr.K.K.Sasidharan for the respondent no.2.

CORAM : B.H. MARLAPALLE,J.

DATED : 29th September 2005

P.C.

Heard Mr.Sutrale, the learned counsel for the appellant, who is the plaintiff in S.C.Suit No.6322/2001. Notice of Motion No.1302/05 was taken out by the defendant no.2, who is the son of defendant no.1. The plaintiff and the defendant no.1 are real brothers and the said notice of motion has been made absolute by the impugned order dated 5.5.2005 passed by the learned Judge of the Judge of the City Civil Court in terms of the following directions:

> "4. Pending the hearing and final disposal of suit, plaintiff is restrained from collecting any rent from tenants and/or administer the affairs and/or transferring tenancy and/or accepting any surrender of tenancies from the

tenants of the suit property.

5. However, whenever any occasion arises from transfer of tenancy, accepting surrender of tenancy or payment of rent by the tenants to the Plaintiff, he shall take permission from the Court in that regard after giving sufficient notice to the Defendants 1 and 2.

6. Pending the hearing and final disposal of the suit, plaintiff is directed to deposit a sum of Rs.3,50,000/- collected by him under the Agreement dated 31.1.2005 being ex.D to the Affidavit in support to the present Notice of Motion within one month from today.

7. The hearing of the SC suit No.6322 of 2001 is expedited."

2. It is contended by the plaintiff that the defendant no.2 has no independent right in the suit property which is in the joint ownership of the plaintiff and the defendant no.1. However, the defendant no.1 has created a document alleged to have been signed by the father of the plaintiff and the defendant no.1 in favour of the defendant no.2 and on the basis of the said document, the defendant no.2 has been collecting rent from the tenants. It is also contended that on the face of the order dated 24.3.2003 passed in Notice of Motion No.5236/2001 filed by the plaintiff, the impugned order could not have been passed by the trial Court.

3. The order dated 24.3.2003 in effect has confirmed the interlocutory order dated 11.12.2001 and Notice of Motion No.5236/2001 was not made absolute in terms of

prayer clause (a)(i) therein. The operative part of the interlocutory order dated 11.12.2001 reads as under:

> "In the meantime the defendant no.2 is restrained from transferring tenancy or creating new tenancy or carrying out any construction in the suit property till returnable date of the notice of motion."

4. The defendant no.2 moved Notice of Motion No.1302/2005 as the plaintiff during the pendency of the suit allegedly created fresh tenancies by an agreement dated 31.1.2005 with Mr.Vipul Panchal and received amount of Rs.3,50,000/-. The main relief in the plaintiff's suit is for the declaration that the plaintiff and the defendants are the co-owners of the suit premises which devolved equally among them upon demise of their late father Mr.Sukhari Manilal Shah and while this suit is pending, it is ordered that both the parties are restrained from either creating third party interest or any additional construction. By the impugned order, the plaintiff has been directed to deposit the amount of Rs.3,50,000/- with the Court. No interference is, therefore, called for in the said order and it would be at the same time necessary that the rental receipts in respect of the suit property are deposited with the court below during the pendency of

the suit., Hence, the appeal is dismissed in limine and it is directed that both the plaintiff and the defendants shall deposit the rental amounts in respect of the suit premises with the Registry of the trial Court and with the leave of the Court, they may apply for withdrawal of part of the amount for payment of taxes etc. The disbursement of the balance amount shall be subject to the decree to be passed in the Suit.

5. Civil Application does not survive.

(B.H.MARLAPALLE,J.)